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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

Estate of HARRIET JEAN SCHWARTZ, Deceased.	B289818 (Los Angeles County Super. Ct. No. BP169006)
JANA KANNER, Petitioner and Respondent, v. NORMA ZUCKERMAN, Objector and Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County, Lesley Green and Barbara R. Johnson, Judges. Affirmed.

Norma Zuckerman, in pro. per., for Objector and Appellant.

Klapach & Klapach, Joseph S. Klapach; Stevenson Law Office, W. Todd Stevenson, for Petitioner and Respondent.

Concerned about susceptibility to financial harm and undue influence, a probate court placed the estate of Harriet Jean Schwartz (Jean) under a temporary conservatorship in February 2015, nine months before Jean died (at age 91) in October 2015. While the conservatorship was in force, Jean executed what was intended to be a full restatement of her revocable living trust—a restatement which, among other things, increased the benefit to one of her daughters and made a portion of the benefit to her other daughter contingent on her agreement to dismiss the petition that gave rise to the conservatorship proceedings. We consider whether the probate court correctly concluded Jean's execution of the trust restatement while subject to the temporary conservatorship rendered the restatement void.

I. BACKGROUND

A. Jean's Estate Plan Prior to 2015

Jean, a widow, had three children: daughters Norma Zuckerman (Norma) and Jana Kanner (Jana), and a son, Dana Schwartz (Dana). Jean executed the Harriet J. Schwartz Revocable Living Trust (the Trust) in 2001.

Jean's initial contribution to the Trust included residential real estate on Bagley Avenue in Los Angeles (the Bagley property), residential real estate on Oakmore Road in Los Angeles (the Oakmore property), two lots on Alameda Street in Los Angeles (the Alameda properties), and a 50 percent interest in a shopping center on Central Avenue in Glendale (the Glen Vine property). As first created, the Trust provided that, upon Jean's death, Jana would receive the Oakmore Property subject to her assuming full responsibility for a note secured by the

property; the Alameda Properties would be divided between Norma and Jana unless Dana conveyed a neighboring lot to the Trust, in which case the Alameda properties and the neighboring lot would be divided evenly; and all remaining property would be divided evenly.

After executing a First and Second Amendment to the Trust in 2007 and 2011, Jean executed a Third Amendment later in 2011 that made changes in the distribution of Trust assets. As relevant for our purposes, the Trust as then amended stated Norma had benefited from her husband's receipt of loan proceeds secured by one of the Alameda properties and directed the trustee to "deem the value of [this] prior benefit to be $475,000.00 less any and all amounts paid by NORMA or her husband to the holder of the Note" and to reduce Norma's share of Trust assets after Jean's death "to reflect that net prior benefit."

Jean executed a Fourth Amendment later in 2013, which refined adjustments to distributions based on prior net benefits. As to Norma, the Fourth Amendment provides that her share of Trust assets after Jean's death shall be reduced to reflect the net prior benefit, defined as the sum of (1) $475,000 in loan proceeds secured by the Bagley property and one of the Alameda properties, "less any and all amounts paid on principal by or on behalf of NORMA to the holder of the loans, plus the amount of any [$1,000] monthly payments on the loans not made by or on behalf of NORMA starting with the month of February 2013"; (2) the amounts owed on two of Jean's credit cards used by Norma; and (3) the amount owed on a car leased to Jean but used exclusively by Norma and her husband. Jean's Fourth Amendment to the Trust recognized that Dana had also been

greatly benefitted by lifetime gifts, but considered those gifts attributable to "special need."[1]

Jean executed a Fifth Amendment to the Trust in 2014 but later rescinded that amendment and documented her "wish to have the Fourth Amendment of Trust be re-instated as is."

B. Conservatorship Proceedings, and the Restatement of and Sixth Amendment to the Trust

Jana filed a petition seeking a court order for temporary and permanent conservatorship of Jean and her estate in February 2015. Jana alleged certain business decisions demonstrated Jean may have dementia, lacked capacity and was subject to undue influence, and was incontinent.

The probate court held a hearing in February 2015 to consider imposing a temporary conservatorship. Jean did not attend the hearing, but she was represented by retained counsel Mark Phillips (Phillips) and a probate volunteer panel attorney, Marc Edwards (Edwards).[2] Edwards said he did not have an opportunity to interview Jean, but recommended the court impose a temporary conservatorship based on conversations with Jean's former accountant, John Pagano (Pagano), and physician, Dr. Mitchell Cohen (Dr. Cohen). Phillips objected to the proposed conservatorship on Jean's behalf and represented he found her to

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[1] Dana's special needs included expenses for legal fees. Dana had been criminally charged with the fraudulent resale of recyclables and fled the United States to Colombia during the criminal proceedings.

[2] Phillips acknowledged Jean knew about the hearing and knew she had a right to appear, but opted not to attend.

be "lucid," with an "excellent" memory and good understanding of "all of the issues." He stated she "handles her own affairs," "seems to be in really good physical shape," and "bristles at any suggestion that she's incontinent." Phillips mentioned Jean had "recently discharged [Jana] as her property manager and hired a professional property manager" and he speculated "that this proposed conservatorship is one tool in a battle being waged by [Jean's] children over their inheritance one day."

The probate court reviewed declarations from Pagano and Dr. Cohen, who had known Jean for decades. The court was troubled by "erratic behavior" described by Pagano and emphasized Dr. Cohen had "grave concern[s]." The probate court ruled it would impose a temporary conservatorship over Jean's estate to "put a hold on any sort of undue influence and any sort of actions that she may take that may harm her financially." The court appointed Stan Mandell and Shoushan Movsesian to be the estate's temporary co-conservators. As to whether there should be a conservator for Jean herself, the court decided not to take action on that aspect of Jana's petition "given [Jean's] objections and the fact that there is a[n upcoming] hearing on the permanent [conservatorship]."

At this same hearing, attorney Phillips sought clarification concerning the scope of the temporary conservatorship. He had "no objection to [the temporary conservators] marshaling and preserving" Trust assets, but he "would object to anything that suggests that [Jean] lacks capacity and doesn't have the right to amend the dispositive provisions of her estate plan." The probate court initially remarked it did not "have any information to make that sort of finding" and then elaborated: "I don't know what to tell you with respect to the trust. I'm open to suggestions.

[Jean]'s the trustee. I'm not finding at this point she lacks capacity, so I guess we really haven't prevented her sending, for example, trust assets to her son." Vik Brar (Brar), an attorney representing the temporary conservators, then interjected to emphasize that, "under the Probate Code, if there's a conservatorship of the estate, . . . [Jean] can't really act as trustee." The probate court said "[o]kay," decided it was "not dealing with amendments," and asked Brar for his opinion on whether the temporary conservatorship would be "sort of overriding [Jean's] trusteeship." Brar reiterated his "understanding . . . that once you're a conservatee, you can't really continue to act as trustee." After this exchange, the probate court gave the parties the following guidance: "[M]arshaling, preserv[ing], et cetera, would go to—the trust is brought under court supervision, and the trust assets would be handled by the co-conservators, as well. And, once again, that's no selling, hypothecating. It's just to marshal and preserve."

The probate court held a subsequent conservatorship hearing in March 2015. Jean was present at this hearing and Edwards, the probate volunteer attorney, requested the petition be dismissed. The court set the matter for trial and left the temporary conservatorship in place, explaining, "we have sufficient evidence to support the petition [and] I can't just out of hand dismiss the petition." Among the evidence then before the probate court was a report of a geriatric psychiatric examination conducted by Dr. David Trader (Dr. Trader) in which he concluded, "with reasonable medical certainty, [Jean] is substantially unable to resist undue influence." (We discuss Dr. Trader's report and conclusions in more detail, *post*.)

The probate court continued the temporary conservatorship in force at a later hearing in May of the same year. During that hearing, Edwards asked the court to allow Jean to amend the Trust: "[Jean] wants to make a change to the beneficial interests passing to her children. [¶] She simply wants to—she knows who her children are and she knows what property she has. It's a simple trust amendment, should be evaluated under the lower capacity level of [Probate Code[3] section] 6100.5, but she is under a temporary conservatorship of the estate only at this time. [¶] So we're informing the court that is what she wants, and we would like to be able to move forward. [¶] She's talked to an attorney, a different attorney, who's drafted up documents to reflect her exact wish and desire, and they're ready to be executed." Jana's attorney objected, contending the matter "should be addressed in a petition, . . . not casually, without any investigation being done."

The probate court declined to make an on-the-spot ruling on the unbriefed request, but warned Jean and her attorney of consequences that may ensue if she were to move forward: "I don't see that [Jean] needs a petition to prepare [the amendment]. If she does it, there may well be a challenge later, given the circumstances. . . . So I'm not giving her permission to do it. . . . I'm not prohibiting her. [Jean] is going to do what she's going to do, and if there's a challenge later and if that's thrown out for the reasons that were stated, then it is. . . . All I'm saying

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[3] Undesignated statutory references that follow are to the Probate Code.

is, you're asking me to make an order based upon a couple of sentences in a report that I have.[4] I can't do that."

Jean did move forward the very next day and executed the "2015 Amendment to and Restatement of the Harriet J. Schwartz Revocable Living Trust." Although the parties refer to this document as "the Sixth Amendment" (and we shall do the same for the sake of consistency), the 43-page document "amended and restated [the Trust] in its entirety." Most pertinent to this appeal are the provisions concerning the distribution of Trust assets after Jean's death—particularly the omission of the net prior benefit provisions that reduced Norma's share based on lifetime gifts she and her husband had received and the addition of "Jana Conditions" included to penalize Jana (the effect of which would also benefit Norma and Dana) unless she were to dismiss the pending conservatorship petition.[5] The Jana Conditions require

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[4] This appears to be a reference to Dr. Trader's report. The relevant portion of the report reads: "[Jean] has a basic understanding of the testamentary act, her property and those who would be affected. As has been discussed, my concerns are that she may make decisions based on skewed reasoning or insufficient information. I am also concerned that she may be unduly influenced into making many of her decisions."

[5] The purpose of the Jana Conditions is described in the trust document itself: "(a) The Trustor strongly believes that, even accounting for her advanced age, she is fully competent to manage both her own financial affairs and her own personal care and well-being, and to engage assistance as she deems necessary with regard to both her financial and her personal activities. . . . Nonetheless, and with full knowledge of the Trustor's strong desires and preferences, JANA has initiated proceedings in the Los Angeles County Superior Court to have a conservator of the estate and a conservator of the person of the

Jana to (1) dismiss the conservatorship petition before the earlier of Jean's death or June 30, 2015, and (2) refrain from commencing or participating in any subsequent action to establish a conservatorship over Jean. If the Jana Conditions were satisfied, Norma, Jana, and Dana would share the Trust assets equally; if the Jana conditions went unsatisfied, Jana would receive the lesser of $250,000 or 10 percent of the Trust assets while Norma and Dana would divide the remainder among just the two of them.[6]

C. Jana's Challenge to the Sixth Amendment

Notwithstanding the execution of the Sixth Amendment and its inclusion of the Jana Conditions, Jana did not dismiss the conservatorship petition she previously filed. Jean died roughly

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Trustor appointed. As of the date of this Trust Instrument, a temporary conservator of the estate of the Trustor has been appointed. [¶] (b) In order to discourage JANA from further pursuing the appointment of a conservator of the person of the Trustor and to encourage JANA to take the necessary steps to eliminate any conservator of the estate of the Trustor, the Trustor has established the Jana Conditions . . . and the Trustor intends to inform JANA of the Jana Conditions and the consequences of JANA's complying with, or failing to comply with, the Jana Conditions. . . . [I]t is the Trustor's desire that the portion of the trust estate passing to JANA after the death of the Trustor will be contingent upon whether or not JANA has complied with the Jana Conditions during the Trustor's lifetime."

[6] The Sixth Amendment also provides that property allocated to Norma and Jana is to be distributed outright and free of trust, but property allocated to Dana is to be held in a separate trust for his benefit—with Norma named as the contingent beneficiary.

two weeks before the date set for trial in the conservatorship proceedings.

A short time thereafter, Jana commenced this action seeking, among other things, a declaration that the Sixth Amendment is void because of lack of capacity, undue influence, fraud, and mistake of fact. The probate court held a 10-day bench trial at which Jana and Norma presented evidence regarding Jean's capacity and motives when she executed the Sixth Amendment.

Jana testified she had served as property manager for Jean's real estate business prior to February 2015, but Jean fired Jana when Norma cut off contact between Jean and Jana in February 2015. Jana believed Norma turned Jean against her by convincing Jean that Jana was embezzling from the real estate business. Jana testified Jean lived at the Bagley residence her entire adult life until Norma "transitioned" her to Las Vegas around this time. Jana commenced the conservatorship action to "conserve the estate from [Norma]" because Jean "kept on signing documents that were put under her nose, and it was getting very costly, and [Jana] couldn't keep up with it anymore." Jana met with Jean the day before she died in October 2015 and attempted to persuade her the embezzlement allegations were untrue. Jana found Jean to be "engaged" during their meeting and "sharp for being [almost] 92."

Norma confirmed she told Jean that Jana was taking money from the real estate business. She claimed, however, that Jean fired Jana as property manager because Jana held up the sale of the Glen Vine property and was not paying business taxes. She also denied isolating Jean from Jana, explaining Jean consistently said she did not want to see Jana beginning in

February 2015. Norma said Jean was "distraught" about the conservatorship and amended her estate plan to encourage Jana to dismiss the conservatorship petition. Norma drove Jean to meet a new estate planning attorney, Alan Grass (Grass), who prepared the Sixth Amendment.

Several witnesses provided testimony tending to support Jana's contention that Jean was susceptible to undue influence near the end of her life. The key testimony in this respect was from Dr. Trader, Pagano, and one of Jean's former attorneys, Jerry Staub (Staub).

Pursuant to an order in the conservatorship proceedings, Dr. Trader conducted a psychiatric examination in March 2015 that involved two interviews with Jean and conversations with acquaintances. The report Dr. Trader prepared for the conservatorship proceedings—which, as mentioned *ante*, was before the court when it ordered the temporary conservatorship—was introduced at trial. Dr. Trader concluded Jean suffered from mild neurocognitive disorder. He reported Jean "tended to believe whatever was told to her as fact" and "could not explain how she would determine the truth" between conflicting statements regarding her assets. Although he did not believe Jean's "mental function deficits significantly impact[ed] her ability to provide properly for her basic needs," he concluded she was "substantially unable to resist undue influence."

Pagano testified he had known Jean for about 30 years, during which time Jean (and later Jana) kept the books for Jean's real estate business while Pagano prepared her taxes. He was also named sole successor trustee in the rescinded Fifth Amendment to the Trust. Pagano believed Jean was under significant pressure to sell the Glen Vine property despite his

counsel that doing so would trigger several hundred thousand dollars in tax liabilities that would be avoided if the property were sold after her death. Pagano said he was "grill[ed]" about this advice by Marty Godin (Godin), an attorney named as trustee in the Sixth Amendment,[7] and Norma's son, Kirk. Pagano believed Jean did not want to sell the Glen Vine property because, in addition to the tax implications, "she really had an emotional attachment to it." Nonetheless, in February 2015, Jean called Pagano and told him she was terminating him as a successor trustee and she wanted to sell the Glen Vine property. Pagano had the impression that Jean was "being coached" on the call.

Staub testified he served as Jean's attorney in two matters. In 2011, Jana referred Jean to Staub to represent her in a quiet title action. In 2014, Staub represented Jean in canceling a purchase and sale agreement for the Glen Vine property. Staub testified that he "met with [Jean] several times, and she said, I have no memory of signing this document; Kirk brought it to me and he told me it was something else—I forget—but I don't want to sell the property." Staub persuaded the buyer to cancel the escrow.

Based on his conversations with Jean, Staub believed "that all three children, Jana, Norma, and to some extent the brother, . . . were kind of working on [Jean], and she would go back and forth." He believed Jean was susceptible to influence from both Norma and Jana: "I think, my observation was, that she loved all three of her kids. . . . And whoever she talked to

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[7] According to Jana, Jean also paid Godin to represent Dana in his criminal case.

last, that's whose opinion she followed. And if it was Norma, then Norma was great. If it was Jana, then Jana was great. If it was Dana—I don't think Dana was ever great."

Several other witnesses—all attorneys who worked with Jean in her final years—suggested the Sixth Amendment was a purposeful expression of Jean's anger regarding the conservatorship proceedings. Even some of these witnesses, however, had concerns about her susceptibility to undue influence.

One of these witnesses, Mitchell Cohen (Cohen),[8] is a former neighbor and attorney of Jean's. He represented Jean in 2014 when she sought to cancel a purchase and sale agreement for the Bagley property. Jean "believed that she didn't enter into the purchase and sale agreement, and there was a complaint by the buyer." Cohen nonetheless believed Jean wanted to sell the Glen Vine property because several units were vacant and the property was losing money.

Cohen referred Jean to Grass, the attorney who prepared the Sixth Amendment, and was privy to some of her thoughts concerning her estate plan.[9] Cohen testified Jean was "very upset" about the temporary conservatorship. She told him that she wanted to amend the Trust to "cut [Jana] out entirely." Cohen also explained why Jean eliminated the provision reducing Norma's share based on prior net benefits: "I think that in the

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[8] We refer to Dr. Mitchell Cohen as "Dr. Cohen"; we refer to Jean's neighbor, Mitchell Cohen, as "Cohen."

[9] Cohen also testified he represented Jean in the conservatorship proceedings, but his role in that matter is not clear.

end [Jean] decided . . . that she didn't feel like that was a proper adjustment given the fact that she had given money to Dana, that also Jana had received money. So I think that she believed that she wanted to change her plan and give each a third, a third, and a third, assuming that Jana would dismiss the conservatorship proceeding." Although Cohen generally had no doubts about Jean's capacity to contract and believed she was "ultracareful" in reviewing documents, Dr. Trader's report gave him some concern about her susceptibility to undue influence.

Grass testified Norma brought Jean to his office on April 10, 2015. The three of them spoke briefly in a conference room, but Grass had Norma wait in the lobby while he discussed the specifics of the Sixth Amendment alone with Jean. Jean seemed "very determined, firm, and kind of upset with what had been going on with regard to the conservatorship and . . . she seemed very eager to make it go away." "She expressed that she wanted to modify her existing estate plan . . . to treat her children equally, and she wanted that equal treatment to be conditioned on her daughter, Jana, dropping the conservatorship proceedings. And if Jana didn't do that, she didn't want Jana to inherit." Jean agreed, based on Grass's recommendation, not to completely disinherit Jana if she failed to satisfy the Jana Conditions.

Grass explained he prepared an amendment and restatement of the Trust—as opposed to just an amendment—for three reasons: "[F]irst of all, when I take over for another—documents prepared by another lawyer, it's always easier, I'm more comfortable, everything being equal, to use the language I'm familiar with. [¶] In addition, there were five amendments, and I thought incorporating them into one unified document made a lot of sense. [¶] In addition, very frequently, once a trust

is amended and restated, that becomes the document that gets sent out under section 16061.7.[10]" Although he believed the dispositive provisions were "simple," Grass considered the Sixth Amendment "more complex than a simple five- or six-page trust" because "[i]t covered a lot of topics." He spent "certainly in excess of ten" hours preparing the document and paid another attorney to provide him with language for the Jana Conditions.

In a departure from his usual practice, Grass was not present when Jean executed the Sixth Amendment on May 19, 2015. Instead, Jean executed the Sixth Amendment with Edwards, the probate volunteer attorney who represented Jean in the conservatorship proceedings. Grass believed Jean had capacity to execute a valid trust when he met with her in early April, but he had concerns about her susceptibility to undue influence after he reviewed Dr. Trader's report.

Edwards testified Jean told him in May 2015 that she wanted to amend her Trust so Jana would "withdraw the conservatorship action. And if she did that, then there was going to be—she wanted to treat all the kids equally—or get an equal share. And if Jana did not withdraw the petition, then it was going to be a—Jana would have a reduced share of the Trust." Edwards "considered [Jean] to be sharp and . . . accurate and aware of the situation."

Karl de Costa (de Costa) also represented Jean in the conservatorship proceedings. He testified Jean was deeply offended by the conservatorship proceedings, especially insofar as

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[10] Section 16061.7 provides for notification to beneficiaries and others when, among other things, a revocable trust becomes irrevocable because of the death of the settlor or there is a change of trustee of an irrevocable trust.

the petition publicly aired allegations of dementia and incontinence. De Costa was present at Jana's meeting with Jean the day before Jean died, which he said ended with Jean disappointed that Jana would not commit to dismissing the conservatorship petition. De Costa never observed Norma asserting control over Jean.

D. The Probate Court's Decision

The probate court found the Sixth Amendment void for three independent reasons.

First, the probate court ruled that because Jean was subject to a temporary conservatorship when she executed the Sixth Amendment in May 2015, she lacked the capacity to contract. The court recognized a conservatorship does not amount to a finding the person subject to the conservatorship lacks testamentary capacity, but the court found the Sixth Amendment was sufficiently complex to require *contractual* capacity—a higher standard.

Second, the probate court concluded Jean lacked capacity to execute the Sixth Amendment under the terms of the Trust itself. The court relied on section 7.5 of the original Trust document, which was not affected by any amendments prior to the Sixth Amendment. Section 7.5 provides, in pertinent part, that for purposes of succession of trustees, Jean "shall be deemed incapacitated during such time as she shall be under guardianship or conservatorship . . . ." Other sections of the Trust provide that, in the event of incapacity, the appointed successor "shall succeed to the office immediately upon acceptance of this trust" and "shall succeed to all the rights,

powers, duties and discretions conferred upon the original Trustee."

Third, the probate court concluded the Sixth Amendment was the product of Norma's undue influence over Jean, both presumptively and actually. The probate court relied, among other things, on evidence that Norma isolated Jean from Jana and Jean's longtime financial and legal advisors, drove Jean to Grass's office, and participated in discussions concerning the Sixth Amendment. The court further found Norma stood to receive an undue benefit under the Sixth Amendment because it eliminated reductions to Norma's share of Trust assets based on prior benefits.[11]

II. DISCUSSION

We resolve this appeal on the first of the alternative rationales articulated by the probate court and therefore have no need to discuss the substantial evidence supporting the probate court's undue influence ruling or the incapacity terms of the Trust itself. The probate court correctly relied on the Probate Code and precedent to find the Sixth Amendment was void

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[11] The probate court concluded the Sixth Amendment's Jana Conditions "alone do not establish" Norma would receive an undue benefit because the court thought Jana could comply with the conditions and receive the full benefit under the Trust she was otherwise due. The court found, however, that "even if [Jana] did satisfy the Jana Conditions, the Sixth Amendment still represents a very substantial benefit to [Norma] compared with the amendment then in existence because she would receive her one[-]third share without consideration of any prior benefits paid to her."

because Jean was subject to a temporary conservatorship when she executed it.

As we shall explain, the temporary conservatorship constitutes an adjudication that Jean lacked contractual capacity when she signed the Sixth Amendment. Thus, while the law is that a conservatorship does not preclude the person subject to it from making a will, and some trust amendments are so simple that only this sort of testamentary capacity is required, the Sixth Amendment does not fall within that category. The 43-page instrument is a complete restatement of the administrative terms of the Trust, and even just the dispositive provisions—which adjust shares based on contingencies in the conservatorship proceedings and create a separate trust for Dana—are complex. The existing temporary conservatorship established Jean had no capacity to execute such a document and it is therefore void.

A. Testamentary Capacity and Contractual Capacity

Section 6100.5 defines testamentary capacity, "requiring only that the person understand the nature of the testamentary act, the nature of the property at issue, and his or her relationship to those affected by the will, including parents, spouse, and descendents." (*Lintz v. Lintz* (2014) 222 Cal.App.4th 1346, 1351 (*Lintz*); § 6100.5, subd. (a).) "'"It is thoroughly established by a series of decisions that: 'Ability to transact important business, or even ordinary business, is not the legal standard of testamentary capacity . . . .' [Citation.]" [Citations]."' (*Andersen v. Hunt* (2011) 196 Cal.App.4th 722, 727 (*Andersen*).) It is also "'well established that "old age or forgetfulness, eccentricities or mental feebleness or confusion at various times of a party making a will are not enough in themselves to warrant

a holding that the testator lacked testamentary capacity.'" [Citations.]" (*Ibid.*) Indeed, section 1871 specifically provides that nothing in the article governing capacity to bind or obligate a conservatorship estate shall be construed to deny a conservatee the right to make a will. (§ 1871, subd. (c).)

By contrast, there is no single standard of what the law refers to as "contractual capacity" (*Andersen*, *supra*, 196 Cal.App.4th at p. 741)—although it is universally recognized as requiring greater mental acuity. Sections 810, 811, and 812 link capacity to perform an act, including executing a contract, to the mental faculties required to perform the particular act in question. Section 810 sets forth a "rebuttable presumption . . . that all persons have the capacity to make decisions and to be responsible for their acts or decisions" (§ 810, subd. (a)) and requires that judicial determinations regarding lack of capacity be based "on evidence of a deficit in one or more of the person's mental functions rather than on a diagnosis of a person's mental or physical disorder" (§ 810, subd. (c)). Section 811 lists specific deficits that may support a determination that a person "lacks the capacity to make a decision or do a certain act, including, but not limited to, the incapacity to contract, to make a conveyance, to marry, to make medical decisions, to execute wills, or to execute trusts . . . ." (§ 811, subd. (a).) Section 812 provides that the capacity to make a decision requires an understanding of its stakes and probable consequences.

Sections 810 through 812 together define what precedent has described as a "sliding-scale" contractual capacity standard. (*Lintz*, *supra*, 222 Cal.App.4th at p. 1352.) The capacity to execute a contract "must be evaluated by a person's ability to appreciate the consequences *of the particular act he or she wishes*

to take. More complicated decisions and transactions thus would appear to require greater mental function; less complicated decisions and transactions would appear to require less mental function." (*Andersen*, *supra*, 196 Cal.App.4th at p. 730.)

In the context of trust amendments, one side of the sliding scale lines up with testamentary capacity. In *Andersen*, the Court of Appeal held that "while section 6100.5 is not directly applicable to determine competency to make or amend a trust, it is made applicable through section 811 to trusts or trust amendments that are analogous to wills or codicils." (*Andersen*, *supra*, 196 Cal.App.4th at p. 731.) In *Andersen*, the contested trust amendments did no "more than provide the percentages of the trust estate [the trustor] wished each beneficiary to receive." (*Ibid.*) The Court concluded the "simplicity and testamentary nature" of these amendments made them "indistinguishable from a will or codicil" and the trustor's "capacity to execute the amendments should have been evaluated pursuant to the standard of testamentary capacity articulated in section 6100.5." (*Ibid.*)

In *Lintz*, the Court of Appeal adopted *Andersen*'s reasoning that the testamentary standard applies to simple trust amendments but concluded the trust amendments at issue were more complicated than those discussed in *Andersen*. (*Lintz*, *supra*, 222 Cal.App.4th at pp. 1352-1353.) The series of trust amendments at issue in *Lintz* "addressed community property concerns, provided for income distribution during the life of the surviving spouse, and provided for the creation of multiple trusts, one contemplating estate tax consequences, upon the death of the surviving spouse." (*Id.* at p. 1353.) The Court of Appeal held these amendments were "unquestionably more complex than a

will or codicil" and required more than testamentary capacity. (*Id*. at pp. 1352-1353.)

B. Conservatorship and Contractual Capacity

Neither *Andersen* nor *Lintz* resolves how the sliding scale of contractual capacity is affected by the imposition of a conservatorship. Section 1872, however, provides that, subject to exceptions not applicable here, "the appointment of a conservator of the estate is an adjudication that the conservatee lacks the legal capacity to enter into or make any transaction that binds or obligates the conservatorship estate."[12] (§ 1872, subd. (a).) Similarly, Civil Code section 40 provides that a person whose "incapacity has been judicially determined . . . can make no conveyance or other contract" (§ 40, subd. (a)) and (subject to exceptions not applicable here) "the establishment of a conservatorship under . . . the Probate Code is a judicial determination of the incapacity of the conservatee for the purposes of this section" (§ 40, subd. (b)).

The upshot of these statutes is that a conservatorship amounts to an adjudication that the conservatee generally can have no more than testamentary capacity. This conclusion is reinforced by section 1873, a complementary provision that empowers courts to make orders that avoid the default rule that a conservatee lacks contractual capacity. Under section 1873, a court, either in the order appointing a conservator or upon petition, may authorize the conservatee to enter into specific

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[12] Section 1870 sets forth a broad definition of "transaction" as including, but not limited to, "making a contract, sale, transfer, or conveyance, incurring a debt or encumbering property, making a gift, delegating a power, and waiving a right."

transactions or, more broadly, "modify the legal capacity a conservatee would otherwise have under Section 1872 by broadening or restricting the power of the conservatee to enter into transactions or types of transactions as may be appropriate in the circumstances of the particular conservatee and conservatorship estate." (§ 1873, subd. (a).)

Although Section 1872 does not expressly mention *temporary* conservatorships, *O'Brien v. Dudenhoeffer* (1993) 16 Cal.App.4th 327 (*O'Brien*) persuasively holds section 1872 and Civil Code section 40 "inexorably compel the conclusion that an order for conservatorship, *temporary or permanent*, is a judicial determination of incapacity" to execute the transactions covered by section 1872 and Civil Code section 40.[13] (*O'Brien*, *supra*, at p. 332, italics added.) Section 40 provides that the establishment of a conservatorship "under Division 4 (commencing with Section 1400) of the Probate Code" is a judicial determination of incapacity to contract, and a petition for a temporary conservatorship is brought pursuant to section 2250.2, which falls within Division Four of the Probate Code. As the *O'Brien* court reasoned, "Had the Legislature intended section 1872 subdivision (a) and Civil Code section 40 to apply only to permanent conservatorships, it surely would have said so." (*O'Brien*, *supra*, at p. 332.) Further, the *O'Brien* court found additional support for its construction of section 1872 in the statute's legislative

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[13] Norma contends *O'Brien* has no relevance to this case because it involved a gift of real property. Section 1872 and Civil Code section 40, however, make no pertinent distinctions between gifts of real property and other transactions, including amendments to the dispositive provisions of a trust, that bind a trust estate.

history, including Assembly Committee reports that revealed an intent to abrogate, via enactment of section 1872, an earlier California Supreme Court decision that took a narrow view of the capacity implications of a temporary conservatorship. (*O'Brien*, *supra*, at pp. 334-335 [characterizing *Bd. of Regents v. Davis* (1975) 14 Cal.3d 33 as "'prior law'"].)

C. The Temporary Conservatorship Establishes Jean Lacked the Requisite Capacity to Execute the Sixth Amendment

Under section 1872, Civil Code section 40, and *O'Brien*, the order establishing a temporary conservatorship was an adjudication that Jean lacked contractual capacity. Norma's argument to the contrary is unavailing.

She contends that because the court said it was "not prohibiting" Jean from amending the Trust when her attorneys broached the subject in May 2015, the temporary conservatorship should not be construed to limit her capacity in this respect. No such meaning can be fairly drawn from the court's remarks at the hearing. Correctly understood, the court was not commenting on the scope of the temporary conservatorship or its consequences for Jean's capacity to contract; rather, it was appropriately refusing to make a ruling on a legal question that had not been briefed and was not at issue—while still warning Jean and her attorneys that if she were to unilaterally act on her own, the action may well be challenged later: "So I'm not giving her permission to do it. [¶] . . . [¶] I'm not prohibiting her. [Jean] is going to do what she's going to do, and if there's a challenge later and if that's thrown out for the reasons that were stated, then it is." This express refusal to make an order did not "modify the

legal capacity [Jean] would otherwise have under Section 1872 . . . ." (§ 1873, subd. (a).)

Although the temporary conservatorship is accordingly dispositive as to Jean's lack of capacity to execute an amendment more complex than a will or codicil, we still must consider whether the Sixth Amendment calls for more than testamentary capacity. Unlike the amendment at issue in *Andersen*, the Sixth Amendment did substantially more than reallocate the percentage shares of Trust assets among Norma, Jana, and Dana. Even if the complete restatement of administrative terms of the Trust were not sufficiently complex to require more than testamentary capacity, the dispositive provisions alone were. Grass, the drafting attorney who acknowledged the Sixth Amendment "covered a lot of topics," testified he had to hire another attorney to suggest language for the Jana Conditions. Even if the language Grass settled upon was entirely consistent with Jean's wishes, the capacity required for Jean to confirm this would have involved more than understanding the nature of the testamentary act, the nature of the property at issue, and Jean's relationship to her children.

Moreover, among the several witnesses who testified regarding Jean's goals in amending the Trust, none suggested she said anything about placing Dana's share in a separate trust. (See, e.g., *Lintz*, *supra*, 222 Cal.App.4th at p. 1353 [emphasizing that amendments "provid[ing] for the creation of multiple trusts" required more than testamentary capacity].) This was an entirely new provision, and regardless of whether it made good sense in light of Dana's circumstances, understanding the ramifications of placing Dana's share of Trust assets in a

separate trust would have required more sophistication than that needed to make a will.

Because the temporary conservatorship was an adjudication that Jean lacked the contractual capacity required to execute the Sixth Amendment, the probate court correctly determined the amendment was void.

DISPOSITION

The judgment is affirmed. Jana shall recover her costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, Acting P. J.

We concur:

MOOR, J.

KIM, J.